

## MEMORANDUM

DATE: July 30, 2007

TO: Mr. Mitchell Crane, Esquire  
Department of Insurance

FROM: Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: Department of Insurance Proposed Discrimination Regulation [11 DE Reg. 32 (July 1, 2007)]

The State Council for Persons with Disabilities (SCPD) reviewed the Department of Insurance initial proposed regulations in May of 2007 [10 DE Reg. 1670 (May 1, 2007)]. At that time, the SCPD commented on the May draft and shared four (4) recommendations. Please see the attached May 30 SCPD letter. The SCPD has the following observations on the proposed regulations published in the July 1, 2007 Delaware Registry of Regulations.

First, of the four (4) comments in the SCPD letter, the Department incorporated the “Fourth” recommendation into the July version of the regulation, i.e., it deleted the term “or is related to” in §3.0. The SCPD would like to thank the Department for deleting this term.

Second, the preface to the regulation is somewhat misleading. It establishes a June 4 deadline for comments. It also recites that “(t)he text of the proposed amendment is reproduced in the May 2007 edition of the Delaware Registry of Regulations.” This is inaccurate since the July version of the regulations contains at least three (3) changes from the May version, i.e., insertion of “and annuities” in §3.1, deletion of “or is related to” in §3.1, and substitution of October 1 for August 1 for the effective date.

Third, as the title to the regulation indicates, it covers life insurance, annuities and health insurance. However, the proposed Section 1217 is administratively placed within 18 DE Admin Code Chapter 1200 which only covers life insurance and annuities. Health insurance is covered by 18 DE Admin Code Chapters 1300 and 1400. The Commissioner may wish to consider adopting two separate

regulations, i.e., one covering life insurance and annuities in Chapter 1200 and a second covering health insurance in Chapter 1300 or 1400.

Fourth, the proposed regulation literally authorizes a refusal to issue a life or health insurance policy to a person with a physical disability if based on actual or reasonably anticipated experience. This provision may violate Title 18 Del.C. §2316 which prohibits refusal to issue a life or health insurance policy based on blindness or deafness regardless of whether refusal is based on actual or anticipated experience. For example, even if an insurer had actuarial data demonstrating that persons who are blind or deaf have a shorter life expectancy than the general population, Title 18 Del.C. §2316 would preclude consideration of that data in justifying refusal to issue a life insurance policy. Alternatively, if an insurer had actuarial data showing that persons who are deaf/blind have high medical costs, §2316 would preclude consideration of that data in justifying refusal to issue a health insurance policy.

Fifth, there is some “tension” between authorizing consideration of data on actual or reasonably anticipated experience and the statutory prohibition on consideration of genetic characteristics and information. See Title 18 Del.C. §2317; Title 19 Del.C. §§710(8) and 711(a)(1); and Executive Order No. 81 (May 2, 2006). For example, an individual could have an asymptomatic condition which, based on genetic correlates, has a high probability of developing into a debilitating illness. If the currently asymptomatic condition is deemed an “impairment”, the regulation would allow discrimination if “related to actual or reasonably anticipated experience.” However, this would violate the above statutes which prohibit consideration of genetic information.

Based on the observations above, the Council would like to recommend the following:

1. Amend proposed Section 3.1 by deleting “,or is related to” in the last line.
2. Add a Section 3.2 to read as follows:

3.2 Prohibited acts or practices identified in this section supplement, and do not supplant, the statutory prohibition on refusal to issue policies to persons who are blind or deaf (Title 18 Del.C. §2316) and the statutory prohibition on the use of genetic characteristics and information (Title 18 Del.C. §2317).

Thank you for your consideration; and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

Cc: The Honorable Matthew Denn  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council